SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 28 | Issue

Article 26

January 2002

Discussion Following the Remarks of Mr. Barutciski and Mr. Gaines

Discussion

DISCUSSION FOLLOWING THE REMARKS OF MR. BARUTCISKI AND MR. GAINES

QUESTION, DR. CARMODY: We have time for questions. Before we have any questions from the floor, I would like to take the initiative and ask one myself, and that is: both of you have suggested that we need some new restrictions. Milos, in particular, suggested domestic restrictions in conjunction with, perhaps, some restrictions on exports. Sanford, your position was that, in regards to restrictions, we have to think more broadly about what some of these restrictions might entail and some of the values underlying those restrictions. At the risk of suggesting yet another job description for Janine and her Commission, I am wondering if, perhaps, the CEC might step in and play a larger role in some of these restrictions that both of you are suggesting.

ANSWER, MR. BARUTCISKI: I do not want to leave you with the impression there are no restrictions on the withdrawal of water in the Great Lakes Region. The states and provinces all have regulatory regimes, but those regimes – in terms of their impact on the volume of water that is withdrawn, diverted (even leaving aside the Water Resources Development Act[1] issue, which is a particularly American issue) – consist of a legislative framework that allows governors to veto another state's large diversions.

What I am suggesting, merely, is that if we are going to raise the natural resource or environmental justification for not allowing exports, we better make sure that our domestic restrictions are commensurate with the international restrictions. In other words, an export ban is not going to cut the mustard. Something short of an export ban will be required because we clearly *do* allow domestic withdrawal and consumption. We must, in the words of the Appellate Body, look for a more evenhanded regulatory regime.[2] That is the element that I think has been missing in the recent in flurry of activity. The Ontario Government started, when the Nova Group export thing first blew up, with an outright ban on out-of-basin transfers of Ontario waters. That was a knee-jerk reaction. The Ontario government subsequently evolved and took the more nuanced approach that the states and provinces adopted last year, in the Annex 2001,[3] which is still only a work in

[1] There are some nine WRDA statutes (dating from 1974), the most recent being the Water Resources Development Act of 2000, Pub. L. No. 106-540, 114 Stat. 2571 (codified as amended in scattered sections of 33 & 42 U.S.C.).

[2] *See* United States – Standards for Reformulated and Conventional Gasoline, WTO Doc. No. WT/DS2/R ¶¶ 6.8-6.11 (Jan. 29, 1996), 35 I.L.M. 274 (1996).

[3] *See generally* Annex 2001 to the Great Lakes Charter (June 18, 2001), Directive 3,

progress. It is a statement saying that we are going to work collectively – the eight states and two provinces – to develop a regime which will have a much more robust conservation, management and environmental foundation than we have to date.

We do not necessarily need *more* restrictions: we need *intelligent* restriction. The Canadian government's jump on the out-of-basin bandwagon is, unfortunately, a short-term fix to mitigate the public outcry against WTO and NAFTA as a means to selling out our natural resources. The push to ban water transfers, unfortunately, puts a real environment issue that needs to be addressed sooner, rather than later, off to a future date.

ANSWER, MR. GAINES: I want it make it clear that I am not a great proponent of large-scale inter-basin transfers; there are all sorts of problems with those. I dealt with a small example of the problems of an inter-basin transfer and international water issues about 30 years ago, when I was an intern for the State Department for a summer. One of my assignments was to work on the Garrison Diversion Project, which would have involved not only some return flows of waters from the Missouri Basin that would have been used to irrigate farmland in North Dakota, but also return flows that would have gone to the Souris River and would have created some water-quality impacts. This inter-basin transfer might have involved questions about invasive species as well.

I am not advocating inter-basin transfers on a wholesale basis. On the other hand, the view from the South or the Southwest is that the region would not have survived – or it would not have become the region it has become – if there had been strict controls on inter-basin transfers. The City of Houston gets a substantial part of its drinking water from a river basin that is to the east of us. There are enormous inter-basin transfers between the Colorado River in California, between Northern California and Southern California, and between the Colorado River Basin across the Continental Divide and the Arkansas River.

When the water regime is very restricted, it only makes sense to think about, at least on a controlled, managed scale, moving water from one place to another.

In terms of the CEC's mandate, I think that the first executive director did have quite a bit of interest in this, and if you think about North America as an entirety, the distribution of water is from an extreme abundance of fresh water in the northern reaches of Canada to extreme scarcity of water in Mexico. To attempt to compartmentalize these things and say that it is Mexico's problem and the Northern U.S and Canada have nothing to do with it is to put on blinders. I think that the CEC might be – well, the topic is so

---

available at http://www.cglg.org/ projects/water/annex2001.pdf.

politically sensitive – somewhat reluctant, but the CEC is perhaps the forum needed for expert analysis of, and non-confrontational discussion about, just these kinds of sensitive questions.

COMMENT, DR. CARMODY: Questions from the floor? Steve.

QUESTION, MR. DeBOER: I have two questions, one for Professor Gaines and one for Milos, about that knee-jerk government reaction to ban water diversions.

For Professor Gaines, I wanted to take you up on this idea of a hydrocommons and collaborative decisionmaking. I am wondering how far that collaborative decisionmaking goes. As someone who sits on one of the Great Lakes, I am concerned about this idea of equitable uses, but I am also thinking about green lawns in the dry Southwest. Will this collaborative decisionmaking include some sort of protection for us here, in the Great Lakes Region, in order that we would have some control about how the water is being used?

For Milos, I wanted to tease out this idea of trading goods because you say it is in your paper – and I can hardly wait to read it – but I just wanted to draw that out a little bit more. One of the analogies that I have found useful when thinking about water is to think about trees and logs; I am wondering why that analogy, in your opinion, does not work. If the Ontario government or the federal government creates a nature reserve, and says that a particular piece of land will never be logged, yet we continue, as everybody knows, to ship logs to the United States, how could we then say that the ban on logging in one particular area is in violation of GATT Article XI and has to somehow be justified under GATT Article XX? Could not we not simply say it is not covered? It is not trade in goods. We happen to trade in things like this because a log is nothing more than a tree that is cut down. Surely, if we say trees in a park are not for sale, surely you can say that water in its natural state cannot be taken out of that natural state.

ANSWER, MR. GAINES: On the first part: I could say facetiously in reference to the earlier panel on hazardous wastes and the quote from Mayor Giuliani concerning the fact that New York provides the financial service, and you folks in Virginia provide the disposal capacity for our waste. I could say well, you folks provide the water and we provide the golf courses or something like that.

But in fact, more seriously, green lawns, golf courses, and so on, are really not the big water users. The most important water use in that region is agriculture. So I think that to talk about agriculture rather than lawns may place it on a little more equitable basis. Indeed, the international law of water courses and various international agreements about allocation of water do indicate this hierarchy of interest, and the municipal human consumption

typically has the highest priority.[4] If water was really scarce, even the farmers would go without to provide drinking water and water for sewage disposal, whatever, because that is where the need is highest.

But if you get into it, I think it is not a question of some obligation to provide water to a region, but is, rather, a multi-stakeholder consideration of all these interests and priorities. If you were to set aside a certain lake or group of lakes in the United States (*i.e.*, a wild and scenic river) and say that no water was to leave this body of water, regardless of the need, that is perfectly legitimate.

ANSWER, MR. BARUTCISKI: The "knee-jerk" comment was not directed at you, Steve, or your colleagues in the Trade Policy Branch of the Government of Ontario. I always found you all to be a very thoughtful and sophisticated group. However, when the Nova Group issue blew up, I think the government was evidently embarrassed by the gentleman rubberstamping his approval on the project, and that meant that something needed to be done quickly, and that is what happened.

To address your questions on goods: I certainly did not want to duck the issue by any means. At the risk of sounding glib, you talked about a log being nothing more than a tree that has been cut down. That thinking, if I flip it around, is really part of the problem, because I can just as easily say a tree is nothing but a log waiting to be cut down.

I think the issue of whether natural resources are a good is a red herring for a few reasons. First of all, it is clear that human beings unavoidably interfere with natural resources every day in commercial and other activities. In some instances, it is to commodify specific resources, while in others, it is merely to "soften up" surrounding areas (by building logging roads, for example) so you can later proceed to commodify that resource. The fact is that some of these resources will ultimately be transformed into commodities, and the way we regulate the natural resource sector is reflective of this view.

Pristine natural resources are not commodities and cannot be touched by trade laws, whereas goods can be touched. I think it is a much more subtle continuum. The trade laws, or any laws or treaties, for that matter, do try to respond to this issue in ways that appreciate that subtlety. The Appellate

---

[4] Joint Measures to Improve the Quality of the Waters of the Rio Grande At Laredo, Texas/Nuevo Laredo, Tamaulipas, Aug. 28, 1989, U.S.-Mex., T.I.A.S. No. 11701, *available at* 1989 WL 407630 (report noting that, while agriculture faced large risks from water contamination, the danger of the loss of water for human consumption was far more grave). *But cf.* Convention on the Law of the Non-Navigational Uses of International Watercourses, U.N. GAOR 6th Comm., 2d Sess., art. 10(1), U.N. Doc. No. A/51/869 (1997), 36 I.L.M. 700, 719 (1997) ("In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses."). But one could easily argue that custom dictates that human consumption enjoys that higher priority.

Body and the panels from WTO and NAFTA both have struggled with that issue.

Let us go back to the very specific point about why I think the goods argument simply is not going to fly. First, I rarely say something as uncautioned as I am going to say now – at least on legal matters – but I am going to say it: there is not an iota of support anywhere in the WTO or GATT system for the argument that natural resources, or water specifically, are not subject to them. It is a separate issue entirely as to whether or not water is a good in its natural state.

The distinction I want to draw is that you can regulate with respect to natural resources in a way that is purely resource-based. In other words, we can say, as you suggested, "we are going to make this body of water a natural reserve and it will never be touched for commodification in any way, whether it be for export, import or domestic consumption." That is perfectly legitimate. I do not think the trade laws can touch that. Such a restriction would clearly be conservation-based; you are acting to conserve a certain resource in its natural state.

However, when you regulate at the resource level in a manner that and has an impact downstream along the continuum, then you will run into problems. If you were to say, we will not allow latent logs – trees, sorry – to be cut down, shall we say, for export, as opposed to domestic consumption, then clearly you are engaging the trade laws.

For starters, I will say that there is little to no distinction between waters in their natural state and water as a good. I challenge you to go through the WTO agreements; you are not going to find anything to support a contrary view.

Secondly, something to the contrary, GATT Article XX(g) itself talks about measures relating to the conservation of exhaustible natural resources. Why would you need that if natural resources were, by definition, not somehow touched by the trade agreements? My point is, again, a simple one: it is not that they are touched by trade agreements as goods, but that they are touched by trade agreements insofar as the human activity that engages or touches on natural resources is often a commercial activity that ultimately may impact foreign trade as opposed to domestic interests, and that is where you have to keep your eye on the WTO and other rules.

Third, even if water in its natural state is not a good and is therefore outside of Article XI, you get into this vicious circle or, rather, a downward spiral. It is, frankly, a silly debate. Well, fine, if we take one cup of water out of the Great Lakes, is the rest of the Great Lakes potentially subject? Clearly that cup or bottle of water is a commodity, but is the rest of the Great Lakes water a commodity? I think you can obviate the argument altogether by adopting the perspective I was saying: look at what the regulatory regime says. If it regulates the resource as such, our various trade laws may not

apply to it. If it is regulating the human use of that resource along the continuum of commercial activity, then trade agreements may very well apply.

Fourth, the Appellate Body and the trade panels have really skewed away from the "it is a good, therefore this applies; it is not a good, therefore, it does not apply" approach.

I will give you a last reason, which is actually the letter of the USTR from which Sandy quoted. If there were an iota of support in the GATT legal system for the argument that the agreement did not apply to natural resources in their natural state, you would have thought that the USTR reply, or at least the Canadian government's position paper (which is also attached to in the IJC report), might have mentioned that fact. The entire argument really comes down to the one that Sandy made a moment ago: there is a whole body of international law governing non-navigable uses and navigable uses of water and nobody is going to dispute that. This body of law governs all kinds of aspects and facets of water in its natural state. There is no indication in the negotiating history of over 50 years of practice in the GATT and in the WTO that the governments have ever suggested that international law governing water rights and water management should be modified or superseded in any way through the application of international trade rules. To date, nobody has seen fit to challenge a country's restrictions on the export of water in the dispute system. In the longer term, this might change. Who knows what conditions will exist 20 years from now? We need to start thinking about these issues in a much more cohesive manner rather than quick fixes and Band-Aids here and there.

COMMENT, DR. CARMODY: We have had a question from the first Steve, why do not we take one from the second Steve.

QUESTION, MR. CHARNOVITZ: Thank you, Mister Chairman. I have got bad news and good news for the water protectionists here. The bad news is that Milos' analysis, I think, is absolutely right. I would go further and say it is just self-evident that water is a commodity and a good.

The good news is there is a lacuna in GATT law that Milos did not mention, which is that, in the absence of a binding agreement, governments are permitted to tax exports.[5] Therefore, a government that does not want to export water would simply tax it prohibitively. In the United States, we are constitutionally infirmed in being able to levy taxes on exports from other states. My question is this: what is the situation in Canada, at the federal level or at the provincial level, in terms of exports?

---

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. II, 61 Stat. A-11, A-13, T.I.A.S. 1700.

ANSWER, MR. BARUTCISKI: I am not a constitutional lawyer, but I am pretty sure that the federal government has the power under its Section 91(2) – the Trade and Commerce Power[6] – to impose export taxes on the sale of any commodity for export. I seriously doubt that the provincial governments would have a similar power for out-of-province sales of their product. I suspect, for Commerce Clause reasons, you probably have that same limitation here in the U.S.

What I do not know is whether Canada has made any binding agreements under Article II of GATT, to which you have inferred; it may or may not have. If it has not, you are absolutely right; we can make it prohibitive to export by imposing an export tax. I do not see anything wrong with that for a simple reason: all that does is pushes the issue back into the regular, day-to-day, mainstream field of negotiations in the international trade regime. We would say that we are going to impose $120-a-litre export tax on water exports and, over time, as the demand for the product starts to grow, the tax will get negotiated down if need be.

There is another reason why this whole flurry of activity, frankly, is silly. The cost of desalination is rapidly going down. By the time the demand creates such a huge pull, at least for potable water on the Great Lakes or drinking water for arid regions and so on, desalination probably will have caught up and overshot the cost per litre of water exports. It is a different thing entirely if we considered agricultural and industrial uses. Sandy's description of the dynamic leading to look further downstream is still valid. I think the drinking water problem will probably be irrelevant ten or twenty years from now.

COMMENT, AUDIENCE PARTICIPANT: I had a role in that IJC study that referenced the ecosystem aspects of the Great Lakes water.[7] If I recall correctly, the IJC report emphasized that, from any ecosystem perspective, there was no surplus water in the Basin.[8] All of it was being put to good use in the ecosystem, and there were all sorts of human uses tied to those ecosystemic uses, including the water that escaped down the St. Lawrence, because it influenced the Atlantic fisheries out to St. George's Bay. There is no surplus.

Secondly, there is no great abundance of water because there is not much flowing off, it is mostly sitting in being. It is like an aquifer with no sand in it. Going a bit further north, it is a frozen desert. There is a lot of ice out

---

[6] Constitution Act, 1867, 30 & 31 Vict,. c.3, s.91(2) (U.K.), *reprinted in* R.S.C. 1985, App. II., No. 5 (Can.), *available at* http://laws.justice.gc.ca/en/const/c1867_e.html.

[7] INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES (2000), *available at* http://www.ijc.org/boards/cde/finalreport/finalreport.pdf.

[8] *Id.* at 43.

there, but not much water, so there are no vast or abundant water supplies in Canada that are not already being put to good use. If one wants to know where to look for vast resources, it is the ocean, folks. Desalination is less expensive than moving water from the Great Lakes to Texas.

QUESTION, DR. CARMODY: Other questions? Simon?

COMMENT, MR. POTTER: To answer Steve's question, the provinces cannot impose an export tax; only the federal government can do that. Everybody would have to look at that in the context of the softwood lumber case, and that is the conclusion that everyone came to.

This discussion – as to whether water in the lake is a good or commodity – raises another question I would like to put to the two panelists: whether water is or it is not like a forest (which is perhaps not a "good" either), the tree becomes a commodity when it is not actually rooted to the ground anymore and the water also becomes a commodity when it is out of the lake and in a tanker.

If a government charges a fee for the right to withdraw that water from the lake, or if Quebec happens to charge a fee which is not quite as high as Maine charges for the same right to withdraw that water from the lake, are we suddenly in a situation of subsidization, Milos?

COMMENT, MR. BARUTCISKI: Subsidization, in and of itself, unless it is an export subsidy, is not GATT-legal anyways, so who cares?

COMMENT, MR. POTTER: You are running away from the question.

COMMENT, MR. BARUTCISKI: Let me deal with the question. Again, what does it matter if it is a subsidy? I am not running away from answering questions – subsidies come up in two contexts in the WTO. Certain kinds of subsidies are prohibited outright, while others are subject to a regime, such as the Convention on Biological Diversity (CBD).[9] So, if a commodity is subsidized and we are exporting it, then presumably, we are somehow disrupting some country whose domestic water industry is going to bring a CBD action, end of the story.

I think your question has another aspect, too, which is, again, the silliness of this "commodity-or-not-a-commodity" argument. Even if it is not a commodity, let us say the only use of water is water that is taken out, and through our regular tax scheme or water tax you are paying for it so you can drink, shower and cook. At the end of the day, I am wondering if the payment scheme that is used, whether it is a tax scheme or a user fee, might itself be indicative of whether the water is a commodity. That is the kind of silly argument you get into when you try to draw that clear distinction between the tree and latent log. It is a completely artificial, metaphysical argument as opposed to a real one.

---

[9] Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822 (1992).

COMMENT, MR. GAINES: Let me make the comment not on this point but on the previous observation. What you say about the use of the Great Lakes at the moment may be perfectly correct but that does not necessarily answer the issues that I was raising.

Marked-based approaches are now being used in California. California is now in a position where they are forced, under federal mandate, to curtail water use because they have been using, basically, more than their share of the water resources in the West. One of the ways that has been used to reduce water use in California over the past ten or 15 years is by having municipalities pay farmers to improve their irrigation systems by making them more efficient, and the municipalities acquire the water that is saved. In this large system, it appears to me that there may be the possibility that, with lots of different users, there might be conservation opportunities here that would be of value, wherein people in the Southwest might be willing to invest to promote conservation here and use the saved water.

COMMENT, DR. CARMODY: We certainly have had a very interesting panel this afternoon. I would like you to join me in thanking both Milos and Sandy.